FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-075121

Employee: Denise Pile

Employer: Lake Regional Health System

Insurer: Missouri Employers Mutual Insurance

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 15, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Henry T. Herschel, issued January 15, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 6th day of October 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge misapplied the law when he determined employee's injury did not arise out of and in the course of employment. Section 287.020.3(2) sets forth the "arising out of and in the course of employment" test:

> An injury shall be deemed to arise out of and in the course of the employment only if:
>
> > (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
> >
> > (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The administrative law judge changed the test by ignoring the word "equally." "I believe the claimant must show that his/her employment exposed her to a risk that she would otherwise not be exposed in her everyday life." Award p. 7. The administrative law judge applied the statute as if it read, "it does not come from a hazard or risk unrelated to employment to which workers would have not been exposed outside of and unrelated to the employment in normal nonemployment life."

Strict Construction of § 287.020.3(2) RSMo

Section 287.800 RSMo mandates that we strictly construe the Law.

> "[A] strict construction of a statute presumes nothing that is not expressed." 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008). The rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. 82 C.J.S. Statutes § 376 (1999). Moreover, a strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008). The clear, plain, obvious, or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions. 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008).

Allcorn v. Tap Enters., 277 S.W.3d 823, 828 (Mo. App. 2009).

"It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 252 (Mo.banc 2003), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

At first blush, the language of § 287.020.3(2)(a) is straightforward. It seems I can easily apply the subsection to the facts after I substitute the definition of "the prevailing factor" from § 287.020(3) (1). After I substitute the definition, I discover the matters to be proven are unclear: "It is reasonably apparent, upon consideration of all the circumstances, that the accident is *the primary factor, in relation to any other factor, causing both the resulting medical condition and disability,* in causing the injury." In the instant case, employee established causation as to condition, disability, and injury so the lack of clarity is not an issue.

The language of § 287.020.3(2) (b) is confusing from the jump. It is clear that the section is intended to limit workers' compensation recovery to injuries that result from some hazard connected with work. The difficult job is determining how unique or specific to work a hazard must be to support compensation. The legislature made the difficult job even harder. Rather than affirmatively stating the attributes of hazards that will support compensation, the legislature described attributes of hazards that will not support compensation. To further complicate things, the legislature described most of the attributes in the negative. An injury is only deemed to arise out of and in the course of employment if the injury "does **not** come from a hazard or risk **un**related to the employment to which workers would have been equally exposed outside of and **un**related to the employment in normal **non**employment life."

Upon analyzing § 287.020.3(2) (b), I find it contemplates four categories of hazards:

1. Hazards or risks related to employment with an equal degree of exposure[1]
2. Hazards or risks related to employment with an unequal degree of exposure
3. Hazards or risks unrelated to employment with an equal degree of exposure
4. Hazards or risks unrelated to employment with an unequal degree of exposure

Only injuries resultant from #3 – a hazard or risk unrelated to employment to which workers have equal exposure in nonemployment life – are denied compensability based upon subsection (b) of the 'arising out of and in the course of employment test.'

Missouri Supreme Court holding regarding § 287.020.3(2) RSMo

The Missouri Supreme Court recently interpreted § 287.020.3(2) to mean that "[a]n injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved – here, walking – is one to which the worker would have been exposed equally in normal non-

[1] Comparison of employee's work-related exposure to a hazard or risk against the exposure to the same hazard or risk of workers in general in their nonemployment life.

employment life." *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671 (Mo. 2009).

The observant reader will note that in reaching the above conclusion, the Supreme Court changed the test of § 287.020.3(2) (a) from whether the "accident" was the prevailing factor in causing the injury to whether the "work" was the prevailing factor in causing the injury. The Court's holding creates a dilemma for our application of the law.

On the one hand, we are bound to strictly construe the language of the statute meaning we shall "presume nothing that is not expressed" and we must confine "the operation of the statute to matters affirmatively pointed out by its terms." See *Allcorn*, supra. On the other hand, we are bound to follow the most recent pronouncement of the Supreme Court even where, as here, the Supreme Court has substituted language in the most important statutory test in the Missouri Workers' Compensation Law. Following the most recent precedent of the court and using the definition of prevailing factor provided by the legislature, I will apply § 287.020.3(2) (a) as if it reads: "It is reasonably apparent, upon consideration of all the circumstances, that the work is the primary factor in relation to any other factor, in causing the resulting medical condition and disability, in causing the injury."

Present Application of § 287.020.3(2) RSMo

Employee testified that she worked approximately 50 hours per week in the period immediately preceding the work injury. She estimated that she spent 80% of her work time on her feet either standing or walking. Employee was sitting or lying down more than 50% of her non-work time. At the time of the injury, employee was walking quickly. Employee testified that she was hurrying because it was a busy day. Employee testified that she does not walk at a fast pace outside of work.

Employee's testimony that she was rushing at the time of the incident is supported by the testimony of Dr. Komes and the report of Dr. Swaim. Dr. Komes said employee told him she was injured when she turned quickly. Dr. Swaim noted that employee told him she injured her foot while quickly going to the medicine room. The administrative law judge disregarded the consistent and unimpeached evidence that employee was moving quickly or at a fast pace at the time of the injury. He found that there was "no credible story of 'rushing' to the medicine room" and employee was not "doing anymore at the hospital than she would do in her everyday life." The administrative law judge's findings are contrary to the overwhelming weight of the evidence described above.

Dr. Komes testified that at the time of the primary injury, employee had chronic tendonitis of the peroneal tendon and that the tendonitis was consistent with prolonged walking. He explained that the existence of calcification along the tendon led him to conclude that employee had a significant amount of irritation of her peroneal tendon over a prolonged period of time. He believed employee's walking caused the tendon to scrape against the calcification and the scraping caused the calcification to break off the bone. Dr. Komes testified that walking quickly is more likely to cause a calcification to fracture.

Dr. Komes testified that employee's calcification was caused by employee standing for extended periods of time. Employee testified that she only stood for extended periods of time at work. At the time of the injury, employee was walking quickly to fulfill a work duty – dispensing medication to a patient. Dr. Komes testified that it was the mechanism of walking that caused the calcification to fracture. Dr. Komes was not asked – and did not offer – an opinion about whether employee's ankle injury was work-related.

Dr. Swaim offered an opinion that employee's ankle injury was related to her work. He opined that the August 6, 2006, incident was the prevailing factor in causing employee to develop chronic right foot tendonitis and fragmentation of the os peroneum.

In the instant case, employee's work duties of walking and standing caused both the chronic asymptomatic calcification on her peroneal tendon, the traumatic symptomatic fracture of the calcification or fragmentation of the os peroneum, and the resulting irritation of the tendon. No other causative factors have been identified. Since work duties are the only factors shown to have contributed to employee's ankle condition, ankle disability, and ankle injury, it is undeniable that work was the prevailing factor in causing the condition, disability and injury.

Employee proved that her injury came from hazards or risks related to employment – prolonged standing and walking and walking briskly to care for patients. Such injuries are never denied compensability under § 287.020.3(2) (b). Of course, by proving that her injury came from a hazard or risk related to employment, employee necessarily proved that her injury did not come from a hazard or risk unrelated to employment. This case is distinguishable from *Miller*, supra, in that employee was injured at work and she was injured by a hazard – walking quickly – to which she was not equally exposed outside of work.

Employee has satisfied her burden under each prong of § 287.020.3(2). Her injury must be deemed to have arisen out of and in the course of employment. I would reverse the award of the administrative law judge and grant compensation in this matter. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member